WOULD A SUBSIDY TO THE AMOUNT OF THE TOLLS GRANTED TO AMERICAN SHIPS PASSING THROUGH THE CANAL BE A DISCRIMINATION PROHIBITED BY THE TREATY?

ADDRESS OF MR. HORACE G. MACFARLAND, *of the Bar of the District of Columbia.*

My endeavor shall be to present as fairly and frankly as possible the case for the affirmative of the topic assigned. That is, to maintain that a subsidy to the amount of the tolls granted to American ships passing through the canal would be a discrimination prohibited by the treaty.

The United States at the present time, independent of any limitations imposed by treaty, possesses full power to discriminate in favor of her own shipping, or in favor of the shipping of any other nation, in any manner whatsoever. Without attempting to define the precise legal status of the United States in the Canal Zone, I may state, in the words of Sir Edward Grey, that "the United States has become the practical sovereign of the Canal," and it indisputably follows that as such practical sovereign it has an inherent power to order its affairs within the territorial limits of its sovereignty as its good pleasure may to it dictate. Such rules and regulations as it may make as a condition to the use of its own property by others would be matter of municipal and not of international law.

But before the United States became sovereign of the canal, it entered into a certain contract, commonly called the Hay-Pauncefote Treaty, which superseded, except so far as by its terms it expressly keeps alive, an older contract, the Clayton-Bulwer Treaty of 1850. The inherent, wide, unrestricted powers of the United States as sovereign of the canal are on all sides admitted to be restricted and narrowed by this contract. The precise amount of such limitation and restriction alone is in dispute. So acts of state that would otherwise have been purely matters of municipal law, in so far as they are, or may naturally and properly become, or give rise to, breaches of the obligations and duties imposed by the Hay-Pauncefote Treaty, become cognizable in international law.

It has been proposed that the United States should exact tolls from all vessels, irrespective of their nationality, equal in amount and in manner of imposition on like classes of vessels, and should then, by

means of a grant or subsidy to United States vessels, reimburse these vessels in the amount paid by them, respectively, as tolls. Certain bills having this reimbursement as their object were introduced in the last Congress, but failed of enactment. It is said that similar bills will be introduced in the present Congress.

You have heard this morning the construction of this limiting treaty ably discussed and its several interpretations shown. It is not the province of this paper to again discuss that treaty, but, adopting one interpretation of it, to consider whether a certain specified act would, or would not, be a breach of that treaty so interpreted, and in particular of Article 3, Rule 1, of the treaty. Let us assume, therefore, for the purpose of this paper, that the United States is now under a treaty obligation to hold the canal free and open to the vessels of commerce of all nations, observing certain specified rules, on terms of entire equality with the vessels of the United States so that there shall be no discrimination against such nations or their citizens or subjects in respect of the conditions, or charges of traffic or otherwise, and that such conditions or charges of traffic shall be just and equitable.

The matter is then brought to this single issue. Discrimination as to the charges of traffic, the amount of the tolls, being expressly forbidden, may the United States, after imposing and collecting equal tolls from all vessels of like classes using the canal, without regard to their nationality, then repay to American ship-owners, by a subsidy equal to the amount of the tolls collected from American ships, the charges of traffic previously exacted from them?

If the United States refunds by the grant of a subsidy to American vessels the exact amount of the tolls previously required from them, it is evident that the net effect thus produced is to permit United States vessels to make a voyage via the canal at the same cost as if no tolls were exacted for passage through the canal. Such American vessels would, therefore, other conditions being equal, be able to offer lower freight rates to shippers for such passage than could foreign vessels. The lower freight rates thus made possible would tend to divert to these favored vessels of the United States, traffic that otherwise might have fallen to vessels of other nations.

Such a subsidy would be a distinct detriment to foreign vessels and foreign states. It could only be met and neutralized by grants of equivalent subsidies by foreign nations to their vessels.

> Every state possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows from this principle that the laws of every state control of right all the real and personal property within its territory as well as the inhabitants of the territory whether born there or not, and they affect and regulate the acts done or contracts entered into within its limits.[1]

That a sovereign state may grant subsidies to its own vessels is clear. That the grant of a subsidy by a state to a particular line of vessels owned by its nationals engaged in a certain trade between certain ports, large enough in amount to permit them to underbid the subjects of other Powers for the carrying trade of the world between those ports, is not in international law a ground for complaint by these latter Powers, no matter how much their commerce may be injured by such subsidies, is equally clear.

The right to grant subsidies is one of the attributes of sovereignty, inherent in every state. Such rights are commonly not deemed surrendered by a treaty unless express words clearly relinquishing the right appear in the body of the treaty itself. It is not to be thought that such a fundamental right as the power to grant a subsidy would pass by implication alone without express words.

> It would scarcely be claimed that the setting out in a treaty between the United States and Great Britain of certain rules adopted by the United States as the basis of the neutralization of the Canal would bind any Government to do or refrain from doing anything other than the things required by the rules to insure the privilege of use and freedom from discrimination.[2]

Mr. Mitchell Innes, the British chargé d'affaires, in his note of July 8, 1912, says as to this point "it is true there is nothing in that treaty to prevent the United States from subsidizing its shipping, and if it granted a subsidy his Majesty's Government could not be in a position to complain." And Sir Edward Grey in the note of November 14, 1912, states that "His Majesty's Government did not question the right of the United States to grant subsidies to United States

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[1]Lawrence's Wheaton, 2 Am. Ed., p. 160.

[2]President Taft's "Memorandum to accompany the Panama Canal Act" of August 24, 1912.

shipping generally or to any particular branches of that shipping." The two notes protested against an anticipated grant of a particular sort or kind of subsidy only, against a subsidy calculated particularly with reference to the amount of the user of the canal by the subsidized lines of vessels. And it was intimated that if such a subsidy were granted it would not be in accordance with the obligations of the treaty.

In Sir Edward Grey's note of November, 1912, the character of the objectionable form of subsidy is more clearly delineated. It is said that the United States may be debarred by the treaty from granting a subsidy to certain shipping in a particular way "if the effect of the method chosen in granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the up-keep of the canal, or to grant a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice the rights secured to British shipping by this treaty."

It is not apparent that the United States could or would grant such a subsidy as would impose on British or other foreign shipping an unfair share of the burden of the up-keep of the canal, and it is supposed therefore that it is to those subsidies whose trade effect would be to "create a discrimination in respect to the conditions or charges of traffic" that the British note is peculiarly directed. The concluding clause of the paragraph above cited from this note is in the nature of an omnibus clause to safeguard against the unexpected or the unforeseen.

If all vessels irrespective of nationality, be required to pay equal tolls and all such vessels are secured by the treaty an equality of opportunity in so far as concerns the commercial use of the canal, the granting by the United States of a subsidy to United States vessels equal in amount in each individual case to the exact sum it had previously exacted from them as tolls, would in substance, although perhaps not in form, be equivalent to permitting these United States vessels to pass through the canal free of tolls. Such a subsidy would give United States vessels using the canal an advantage over those of other nations. It would make them toll free of the canal in all but name.

President Taft in his message sent to Congress,[3] sets out as the then opinion of the executive of the United States:

[3]H. Doc. 343, 62nd Cong., 2nd Sess.

> I am confident that the United States has the power to relieve from the payment of tolls any part of our shipping that Congress deems wise. We own the canal. It was our money that built it. We have the right to charge tolls for its use. Those tolls must be the same to everyone, but when we are dealing with our own ships, the practice of many governments of subsidizing their own merchant vessels is so well established in general that a subsidy equal to the tolls, as equivalent to the remission of tolls, can not be held to be a discrimination in the use of the canal. The practice in the Suez Canal makes this clear.

The true effect of the practice thus suggested by Mr. Taft is admitted by the Secretary of War in his annual report for the year 1911, page 54, in which he states, after affirming both the legal and moral right of the United States to pay the tolls on its own vessels:

> Furthermore, I can see no difference, save in form (provided the tolls for other nations are kept reasonable, as we have also covenanted to do), whether the United States should make this appropriation out of her own Treasury to American vessels, by receiving the toll money from them first and repaying it to them, or by simply relieving them from the payment of tolls in the first place.

In the "Views of the Minority" of the Committee on Interstate and Foreign Commerce in the Panama Canal Bill[4] they state on page 4:

> We contend that our right to favor our own shipping cannot be seriously questioned.

And on page 6:

> We have a perfect right under the Hay-Pauncefote treaty to favor our domestic shipping, and *if* we have the right to collect the tolls at the canal and repay them, we certainly have the right to remit them in the first instance. *It is unnecessary to resort to a device or subterfuge in order to do indirectly what* we have a right to do directly.

The economic desirability of such a subsidy as is proposed is open to serious question. But the desirability, the necessity even, of a

[4]Rep. 423, No. 2, 62nd Cong., 2nd Sess.

punctilious discharge of treaty obligations by this country, is beyond question. No country in the world should excel this in the exact religious observance of treaty obligations both in letter and in spirit.

Senator Root, the President of this Society, in his speech in the Senate of the United States, January 23, 1913, forcibly explains this necessity in discussing that provision of the Panama Canal Act that makes a discrimination between the tolls to be charged upon foreign vessels and the tolls to be charged upon American vessels engaged in the coastwise trade. He said:

> The provision has caused a painful impression throughout the world that the United States has departed from its often-announced rule of equality of opportunity in the use of the Panama Canal, and is seeking a special advantage for itself in what is believed to be a violation of the obligations of a treaty. Mr. President, that opinion of the civilized world is something which we may not lightly disregard. "A decent respect to the opinions of mankind" was one of the motives stated for the people of these colonies in the great Declaration of Independence.

It is not becoming to the United States to resort to "a device or subterfuge" in order to do indirectly what it may not do directly.

The Supreme Court of the United States in the case of *Tucker* v. *Alexandroff*, 183 U. S., 424-437, said:

> Treaties should be interpreted in a spirit of *uberrima fides* and in a manner to carry out their manifest purposes.

If the intention of the treaty is as we have assumed for the purpose of this paper, namely, to insure equality of opportunity to the vessels of all nations in the employment of the canal in their peaceful commerce, it would hardly seem fit that the United States should by the exercise of a right of sovereignty not expressly surrendered by the treaty, render nugatory the operation of the treaty in respect to the vital point of equality of tolls.

In the field of municipal law, in the administration of the statutes respecting the regulation of interstate commerce, there are many occasions in which the courts have looked to the result produced to declare whether or not there has been a breach of the law and have brushed aside as irrelevant the question of the innocency of the means used to produce the prohibited result. It has been repeatedly held

that the forbidden effect cannot be produced by otherwise legal means. Having held "that the giving or receiving of a rebate or concession whereby property in interstate or foreign commerce is transported at less than the usual rate is the essence of the offense denounced by Section 1 of the Elkins Act" (*Armour Packing Company* v. *United States,* 153 Fed., 1), little difficulty has been found by the courts and by the Interstate Commerce Commission in looking behind colorable pretense and deciding that to be unlawful which produces in effect discrimination, though *prima facie* it be, by itself, independent of the effect it produces, legal.

> In contemplation of the act any methods however skilfully devised by which an unlawful result is effected become devices for the end attained. In such a case the law deals with the result produced and it is immaterial what means may be employed for the purpose. If the result is unlawful, the means employed come within the condemnation of the statute.[5]

It is to the end effected by the grant or subsidy calculated practically to the amount of the user of the canal by the subsidized lines of vessels, that we must look in our inquiry as to whether or not such a grant violates Article 3, Rule 1, of the Hay-Pauncefote Treaty, and if that end be discrimination the subsidy cannot be blameless.

> The reason of the law or of the treaty, that is to say the motive which led to the making of it and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning, and great attention should be paid to this circumstance. Wherever there is question of an obscure, ambiguous, indeterminate passage in law explaining or applying it in a particular case: where once we certainly know the reason which has alone determined the will of the person speaking we ought to interpret and apply his words in a manner suitable to that reason alone. Otherwise he will be made to speak and act contrary to his intention and contrary to his known views.[6]

The United States is a moral person having continuous personality and responsibility from one generation to another. It is a "perfect international person."[7]

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[5]Schomberg v. D. L. & W. R. R., 4 I. C. C. R., 630-654.

[6]Vattel, Book 2, Chapter 17, Sec. 287.

[7]Oppenheim, *International Law,* Vol. I, Sec. 63.

What is, and has been the "reason" that inspired and governed the United States in this behalf?

The object of the Hay-Pauncefote Treaty as declared in the preamble "is to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the general principle of neutralization established in Article VIII of that Convention."

Article VIII of the Clayton-Bulwer Treaty referred to in the foregoing preamble, is as follows:

> The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Article III, Rule 1, of the Hay-Pauncefote Treaty states that:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

These present declarations in the treaty of 1901 must be read in connection with the long series of declarations and pledges of the United States to the impartial use of the canal by all the nations of the world.

Since 1826 the United States has always contended that the right of communication between the Atlantic and Pacific Oceans by the construction of a ship canal across the isthmus which connects North and South America, should be open to all nations on the payment of reasonable tolls; that this gateway and thoroughfare between the two oceans should be for the navies and merchant ships of the world; that all nations should have a free and equal right of passage. As President Polk said in his message of February 10, 1847, transmitting to the Senate the treaty of 1846 between the United States and New Granada, the then proposed construction of a canal was for "a purely commercial purpose in which all the navigating nations of the world have a common interest."

Lack of space prevents the quotation of this series of declarations here, but they may be found in Moore's *Digest of International Law,* Vol. III, Chap. IX, and documents there cited; "Neutralization and Equal Terms," *Am. Journal Int. Law,* Vol. 7, No. 1, p. 27; and in the messages of the Presidents.

As late as 1904 President Roosevelt in his special message to Congress of January 4th, said:

> Such refusal (to conclude the Hay-Herrán treaty) therefore squarely raised the question whether Colombia was entitled to bar *the transit of the world's traffic across the isthmus.*
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> The great design of our guaranty under the treaty of 1846 was *to dedicate the isthmus to the purposes of interoceanic transit,* and above all to secure the construction of an interoceanic canal.

If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal.

The purpose of the Clayton-Bulwer Treaty of 1850 is clearly shown in that portion of the treaty in which both parties agreed that each should "enter into treaty stipulations with such of the American states as they might deem advisable for the purpose of more effect-

ively carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind on equal terms to all and of protecting the same."

And in Article 8 of that treaty the parties agree "that the canals or railways being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

Mr. Rives, the American negotiator, was instructed to say to the British Foreign Office, in the negotiations that led up to the Clayton-Bulwer Treaty, that "the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all. That the United States would not, if they could, obtain any exclusive right or privilege in the great highway which naturally belonged to all mankind."

Clearly these words of Mr. Rives in 1850 and the equivalent emphatic statements of President Roosevelt in 1904, state the reason which determined the will of the United States in respect to the canal.

We took possession of the Canal Zone; we built this canal for the benefit of mankind. We hold it charged with a public interest. We are in respect to it a trustee for humanity. Such was and is our true position, one universally so understood and continuously so declared by our public representatives for us.

It is only recently, when it has been widely realized that a vast expenditure has been made in constructing this great work dedicated to humanity, that a clamor has arisen for special privilege and preferential treatment for the vessels of the United States that may use the canal. It would seem that the noble conception of self-denial, that the "great design" of benefiting all the nations of the earth was more universally popular prior to the presentation of the bills for the concrete execution of the brilliantly planned ideal than it is now when these bills are paid or in course of payment.

However that may be, no one who reads the record of the United States' utterances on the subject of the waterway route between the

two oceans across the isthmus connecting North and South America can doubt that up to the period subsequent to the Hay-Pauncefote Treaty, subsequent to the acquisition of the Canal Zone by the United States, that the United States stood for equality of opportunity in the use of the proposed communicating passage between the two oceans on equal terms to all, without any reservation whatsoever.

As stated in the note of Sir Edward Grey, of November 14, 1912, the United States is in the unfortunate position of having demanded under a similar treaty provision equality of treatment for citizens of the United States in the use of certain canals of Canada. President Cleveland on August 23, 1888, in his message to Congress on the subject, said:

> By Article XXVII of the treaty of 1871 provision was made to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion of Canada on terms of equality with the inhabitants of the Dominion, and to also secure to the subjects of Great Britain the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States.
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> The equality with the inhabitants of the Dominion which we were promised in the use of the canals of Canada did not secure to us freedom from tolls in their navigation, but we had a right to expect that we, being Americans and interested in American commerce, would be no more burdened in regard to the same than Canadians engaged in their own trade; and the whole spirit of the concession made was, or should have been, that merchandise and property transported to an American market through these canals should not be enhanced in its cost by tolls many times higher than on such as were carried to an adjoining Canadian market. All our citizens, producers and consumers, as well as vessel owners, were to enjoy the equality promised.
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> And yet evidence has for some time been before the Congress, furnished by the Secretary of the Treasury, showing that while the tolls charged in the first instance are the same to all, such vessels and cargoes as are destined to certain Canadian ports are allowed a refund of nearly the entire tolls, while those bound for American ports are not allowed any such advantage.
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> To promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, is to fulfil a promise with the shadow of performance.

The discrimination complained of was simply this: Canada, while nominally charging a toll of twenty cents a ton upon merchandise

both of Canada and the United States, alike, provided that there should be a rebate of eighteen cents per ton for all merchandise which went to Montreal or beyond, leaving, of course, but two cents a ton net charge upon such merchandise. In other words, goods could be carried to the principal Canadian market in that locality via canals for eighteen cents per ton cheaper than they could be carried to the competing American market. As the President well said, to promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, was to fulfil a promise with the shadow of performance. Upon the representations of the United States, Canada rescinded the provision for preferential tolls.

I regret that in my personal opinion the United States in the exercise of its right to grant subsidies may legally, by indirection, in effect discriminate in favor of its own vessels, contrary to the true intent of the Hay-Pauncefote Treaty; but it may well be urged that the United States is under an obligation, an imperfect obligation perhaps, punctiliously to discharge its treaty duties not only in letter but in spirit, and it certainly is preëminently fitting for a country of professed high moral standards to observe duties of imperfect obligation and not by an ingenious, but scarcely an ingenuous, grant of a subsidy calculated with reference to the amount of the user of the canal by the subsidized vessels, keep the letter of its promise; but deny to the promisee the substance of the thing for which he contracted.

[Secretary Scott here retired from the chair, Vice-President George Gray taking the chair.]

The CHAIRMAN. The next address upon the program is one by Mr. William Miller Collier, of the Bar of the State of New York, formerly Minister to Spain, who will discuss the negative of the proposition just discussed by Mr. Macfarland, to wit, "Would a subsidy to the amount of the tolls granted to American ships passing through the canal be a discrimination prohibited by the treaty?"

I now introduce Mr. Collier.

WOULD A SUBSIDY TO THE AMOUNT OF THE TOLLS GRANTED TO AMERICAN SHIPS PASSING THROUGH THE CANAL BE A DISCRIMINATION PROHIBITED BY THE TREATY?

ADDRESS OF MR. WILLIAM MILLER COLLIER, *of New York, formerly American Minister to Spain.*

The question assumes that equal tolls are collected from the ships of all nations by those in charge of the operation of the canal, and that thereafter subsidies of equal amounts are paid by the American Government to its ships. The fact that an actual tangible collection may not be necessary but that proper entries in books of account may accomplish the same result is immaterial. The vital fact is that an equal toll chargeable on all enters into the canal revenue and forms a basis for the determination of the charge that is reasonable and just in relation to the service rendered and the advantage secured—the charge that represents the proportionate share of the expense of operation and maintenance of the canal that ought to be borne by each and every ship making use of it. The subsidy that is paid, though equal to tolls, is neither taken from canal funds nor charged against them. No ship is excluded from using the canal, no ship disproportionately burdened, no ship exempted from tolls, although in the case of the subsidized ship the tolls are paid not by the carrier or shipper or consignee but by the government offering the subsidy.

I have been asked by those who have framed the program for this meeting to present such arguments as suggest themselves to me as tending to prove that such a subsidy is not a discrimination prohibited by the treaty. It is hardly necessary to say that an argument to support the legal right of the American Government to grant such a subsidy is in no sense an expression of opinion that such a subsidy would be a wise policy to adopt. All the objections urged by Professor Johnson, the Special Commissioner on Panama Canal Tolls, may be unanswerable, but they do not affect the question of the legal right of the government to grant them.

No rule of international law prohibits the payment of subsidies. The right exists unless it has been surrendered by treaty stipulation. It is an elementary rule of treaty interpretation that whenever a nation does not contract itself out of its fundamental legal rights by

express terms, the treaty must be so construed as to preserve those rights. Restrictions upon the sovereign right to legislate as to domestic affairs are not to be inferred if any other construction can be made without violating the canons of reasoning. The burden of proof rests upon those who would limit these rights in any manner or to any degree. The United States, then, may grant a subsidy in such form as it chooses unless its treaty obligations by express terms or absolutely necessary inference have restricted it.

I admit that Article VIII of the Clayton-Bulwer Treaty still secures to Great Britain equal rights with the United States as to tolls and conditions of passage, and that she, in common with the other nations that observe the rules fixed by Article III of the Hay-Pauncefote Treaty, has a right to the use of the canal on terms of entire equality for her ships, and without discrimination against them or against her subjects.

I contend that the equality between nations is given to them without discrimination when the passage of the canal is open to their ships upon conditions no more burdensome and upon the payment of tolls no greater than those imposed for the passage of ships of like character of any other nation; that the promise of equality of treatment does not abrogate that equality among nations that is incidental to their independence and their sovereign right to legislate as to their own interests; that the exercise of such a right does not destroy equality if the equal right of other nations to so legislate is conceded, but that, on the contrary, inequality results if such right be denied.

I contend that there is equality between ships and between citizens, and no discrimination, if they are all called upon to pay no more for a given service than anyone else, whether or not they are aided by some one else to make the payment; that it is immaterial whether the burden of the toll be lifted from the carrier and assumed by the shipper, the consignee, the ultimate consumer, or by a government.

It has been intimated that the payment of a subsidy equal to the amount of the tolls is equivalent to collecting no tolls at all. I believe that I have pointed out the vital distinction between this course and an exemption from tolls, and that the objection so strongly urged by Sir Edward Grey against the exemption of coastwise traffic, namely, that it prevented the ascertainment and fixing of tolls that were reasonable and just and imposed a disproportionate burden upon foreign commerce, is inapplicable to the system of paying subsidies

though they be equal to the tolls collected. As a matter of fact, such payment would naturally increase canal traffic and revenue and would tend to reduce all tolls in the future to the benefit of foreign as well as domestic shipping.

It is, however, also strongly urged against this proposed system that the granting of a subsidy equal to the tolls is a discrimination in that it is the use of the canal in such a way that the subsidized shipping acquires a special benefit or a special privilege, and also in that this shipping is given an advantage in competing with other shipping in a manner inconsistent with the treaty.

Let us consider each of these claims. It can hardly be believed that any privilege is inhibited by the treaty unless the ability to grant it was derived from the treaty. The privilege that the subsidy gives is that of drawing money from the United States Treasury, in return for some supposed benefit to the country. It is not a privilege of any special right or special benefit in the canal. Let it be repeated that the subsidy is not paid from canal earnings, nor does it directly or indirectly affect its revenue unless it be to increase it by stimulating traffic. The payment of the subsidy is an act in no way springing from or connected with ownership or operation of the canal. All the chargeable tolls being credited to the canal fund or deposited therewith, in legal effect, the subsidy is an appropriation of other national funds derived from other sources, and which the United States may expend as she sees fit. The aid thus given is not a violation of the obligation to keep the canal open on terms of equality without discrimination.

I now come to the charge that the subsidy equal to the tolls gives a special advantage to one competitor over another which is forbidden by the treaty or inconsistent with the obligations that it creates.

The opening of the canal on equal terms without discrimination does not carry with it a promise that competition between carriers will not be fostered by their respective governments, even by artificial means, nor that any particular form of aid or manner of giving it should be interdicted. The right of nations to subsidize was not in any way restricted. The British Foreign Office in its notes of protest against the Panama Canal Act admits that it does not "find either in the letter or in the spirit of the Hay-Pauncefote Treaty any surrender by either of the contracting Powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient,"

and it concedes the right of the United States to be equal in this respect to its own. As Great Britain unquestionably has the right to pay to her ships subsidies equal to the amount of the canal tolls they pay, there would seem to be no claim by her that the United States has not that right. Yet in another paragraph of Sir Edward Grey's protest it is said:

> His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally, or to any particular branches of that shipping, but it does not follow therefore that the United States may not be debarred by the Hay-Pauncefote Treaty from granting a subsidy to certain shipping in a particular way, if the effect of the method chosen for granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this treaty.

The note of the British *Chargé d'Affaires* of July 8, 1912, made similar admissions and more clearly stated a supposed "distinction between a general subsidy, either to shipping at large or to shipping engaged in a given trade, and a subsidy calculated particularly with reference to the amount of the user of the canal by the subsidized lines or vessels."

The distinction is not a sound one in principle. How would a subsidy calculated with reference to the use of the canal violate the treaty, if, indeed, it violated it at all? In the same manner that any subsidy, general or relating to a given trade, would violate it and in no other, namely, by the granting of an aid that changed natural competitive conditions in a way favorable to the subsidized person, and gave to him an advantage that he would not possess without it. The aim and the end, the purpose and the result of all three methods of subsidizing that have been mentioned are the same. The rights and the duties of the competitors who are affected are the same. If one method be a violation of the treaty, all are; if one method be permissible, all are. And it is contended by me that all are permissible, because admittedly the treaty does not restrict the parties to it from fostering their own commerce and giving it help in its competition with other shipping.

The distinction that the British protest attempts to make between subsidies in aid of a given trade and those "calculated particularly with reference to the amount of the user of the canal" is not a genuine one, not a real one in its practical effect. There is no substantial difference in the results upon the relations of competitors between that which can be done by subsidies in favor of a given trade, the route of which lies through the canal, and a subsidy equal to the amount of the tolls paid for the passage of the canal. What substantial difference is there between a subsidy of $6,000 per voyage granted to a ship of 5,000 tons for every voyage that she may make in a trade by a route leading through the canal and a subsidy calculated on the tolls she must pay, namely, $1.20 per ton for each of the 5,000 tons? If the one method results in inequality of tolls, so does the other. If the one method works a discrimination, so does the other. If the one method gives to American competitors an advantage, so does the other. Yet it is admitted that a given trade may be subsidized. The usual form of subsidies, other than those given to aid in ship construction generally, is the very form I have just compared with the subsidy equal to the tolls, namely, a payment per voyage for a service by a designated route.

To make use of one form to accomplish what can be accomplished by the other is not the adoption of methods of subterfuge or evasion. In the very nature of things any subsidy of any kind granted by any nation whatsoever for a trade passing through the canal must take into consideration the cost of the right of the passage through it. It is impossible for the carrier to leave it out of his estimates of expense. It is equally impossible for a government granting him a subsidy to enable him to meet or to lower his expenses so as to compete more advantageously, to leave it out of calculation. Whether the subsidy be a lump sum, a mileage or voyage compensation, or an open repayment of the tolls, it inevitably aids the carrier, in whole or in part, in paying the tolls, and this result must have been foreseen and intended. It may, then, be repeated that the United States has the same right to grant a subsidy equal to the tolls that she has to exercise the admitted right to grant a general subsidy or a subsidy for a given trade.

Suez Canal Subsidies.—In the British notes of protest against the Panama Canal Act it is practically contended that the rules for the free navigation of the Suez Canal are to guide in the interpretation

of the Hay-Pauncefote provisions as to tolls, as well as to the rights of nations in time of war. Grant it for the purposes of argument. I insist that every nation of the world may grant subsidies to its ships using the Suez Canal, and may make them take the form of a payment of tolls, and I assert that as a matter of fact many of them do. This canal is owned by a private corporation, but Great Britain is the largest stockholder. The company may not have the right to exempt any shipping from the tolls, but the nations may each aid their commerce by paying the tolls paid by their ships. Here are some facts based upon the statements made by Mr. Lewis Nixon in a published letter to the Chamber of Commerce of the State of New York:

> The Russian Government in 1909 appropriated 650,000 roubles *in exact terms* to pay the tolls of the merchant steamers of the Russian Volunteer Fleet both for tonnage and for all men, women and children carried. * * * Austria specifically provides by law for the payment of Suez tolls on steamers from Trieste to Bombay, Calcutta and Kobe. The Swedish Government calculates its subvention to the Svenska Ostaiatiska Kompaniet to represent the amount of tolls paid by the ships of the company for passing the Suez Canal. * * * The British P. & O. Company receives in subsidies enough to nearly pay all its canal dues, although it operates through the canal a number of boats apart from mail steamers. The North German Lloyd receives an annual subsidy on its vessels using the canal of $1,385,000. Japan pays a subsidy of $1,336,947 to the Nippon Yusen Kaisha for its steamers through the Suez to Europe. The Messageries Maritimes, the largest French company using the Suez Canal, was paid for its lines to China, Japan, Australia and Madagascar, $2,145,990 in subsidies.

The right of the United States to pay subsidies on its ships using the Panama Canal must be the same. Surely no one will contend that we must forego this right and permit traffic to be diverted from the Panama Canal to the Suez to the lessening of Panama Canal revenue and the increase of the burden of expense that we must bear. Where, in the name of justice, is there equality if that right be denied to the United States?

The British Government invokes Article VIII of the Clayton-Bulwer Treaty as still securing it equal rights with the United States. What were the rights of the two nations as to subsidies under that treaty? It contemplated the construction of a canal by a private

company. That company would have been obliged to charge the same tolls upon the ships of both nations, but each of these nations would have been free to subsidize its shipping as it thought best for its own interests and could have made it take the form of a payment equal to the tolls, without violating the letter or the spirit of the treaty. The equities are not altered by the fact that the United States has built and is to operate the canal. The rights of Great Britain and other nations under the Hay-Pauncefote Treaty are not greater than they were under the Clayton-Bulwer Treaty. Those of the United States have not been lessened by the abrogation of the latter, even though its eighth article is maintained in force. That treaty was superseded to relieve the United States of disabilities, not to create additional disabilities. If it be said that the United States assumes the obligations and is subject to the restrictions imposed upon the company that was to construct the canal, it may be answered that all these she fulfills and complies with when, as operator of the canal, administrator of a public utility, she collects equal tolls from all ships, and turns them into the canal revenue, and makes that revenue the basis for the determination of the just and reasonable and proportionate charge. Thus her obligations are completely fulfilled. She retains her right of aiding her own shipping with a subsidy equal to the tolls. Thus her treaty rights are secured. Not only does nothing in the Hay-Pauncefote Treaty, or in the negotiations leading up to it, contradict these statements, but every circumstance with reference to which the negotiations were conducted corroborates and confirms them.

As a precedent to determine our treaty obligation, Sir Edward Grey cites the course of Canada under the Treaty of Washington of 1871 granting certain reciprocal rights in the canals of the two countries. Referring to a system of rebates established by Canada and to the protest of the United States against it as a discrimination, he says that it was abandoned "in the face of that protest." But a careful reading of the proceedings in that case shows that it can in no sense be regarded as settling a rule of law and that, instead of proving that Canada and Great Britain at any time viewed their obligations under the treaty in the manner claimed and that Canada's final action was an admission of the American contention, it proves the contrary. In brief, the facts of the case were that by the treaty certain canals were reciprocally opened to the ships and citizens of the two coun-

tries upon terms of equality each with the other. Tolls on the Canadian canals were annually fixed by Orders in Council. The rate on wheat and other grains passing through the Welland Canal was 20 cents, but during a long period of years a rebate of 18 cents was granted upon all wheat that was carried as far as Montreal. Thus the net rate to Montreal was 2 cents, while the rate to Lake Ontario and upper St. Lawrence ports was 20 cents. The American ports, Oswego and Ogdensburg, therefore, claimed that they were discriminated against in favor of Montreal, and the American Government claimed it was a violation of the treaty, being a denial of the equal treatment promised. Another discrimination was based upon the fact that the wheat, which was generally brought from the Upper Great Lakes through the Welland Canal in large ships, had to be transshipped into vessels of lighter draft to pass through the St. Lawrence canals to reach Montreal, and the rebate was allowed only in case the transshipment was made at a Canadian port. What was the nature of the steps taken to secure an interpretation of the treaty, or to obtain the rights of the parties? Diplomatic representations were made by the United States. Statements were met with contradictions; claims of rights were denied or met with counter claims. Occasionally slight modifications were made in the Orders in Council to meet the shifting interests of Canada, but the regulations always continued to be of such a character that the United States contended that they were discriminatory. There was never arbitration of the question, never an agreement as to interpretation, never an admission by Canada that the regulations violated the treaty. There was a resort to retaliation, argument failing. After years of claiming of rights whose existence was always denied, the President of the United States, by virtue of an Act passed by Congress, proclaimed the imposition of a toll of 20 cents per ton on all cargo carried by Canadian ships though the American Sault Ste. Marie Canal, which had theretofore been free of tolls. These tolls were to be collected as long as Canada continued the rebates and discriminations complained of. The next year Canada abolished them in order to gain free passage for her ships through the Sault Ste. Marie Canal. Thus ended, not a litigation, but a commercial war. No one can justly claim that a legal principle was established or that an interpretation of treaty rights was accomplished. If the position taken in the controversy can be invoked against one party, it can against the other. Canada never

admitted that what she had done was inconsistent with her treaty obligations, but in notes presented by the British Ambassador to the Secretary of State just prior to the termination of the incident and also after the abandonment of the system of rebates, she claimed that "every obligation of the treaty had been fully and unreservedly met;" also, that "holding firmly to their contention that they were justified in adopting the tolls and rebates, they consented to waive their rights, in this particular instance, and not re-establish the system of rebates and transshipment regulations" in consideration of benefits to be received by her; and in another place, "the Canadian Government, whilst holding to what they believe to be their right, were willing to waive that right." Still further the statement speaks of Canada as "maintaining what she believes to be her rights under the Treaty of Washington," and adds, "the difference of opinion which exists as to the treaty rights of the two countries is to be regretted, but it forms no ground for a charge that either country in maintaining its own views proceeds with a disregard of solemn obligations."

So far I have endeavored to ascertain the extent of the right of the United States to grant subsidies for its ships using the canal by considering those provisions of the treaty that impose obligations or place restrictions upon her. Let us now consider the measure of her rights as to subsidizing, either expressly or inferentially conferred affirmatively. As one of "all nations" she is given the same rights as any of them as to tolls and as to subsidies. She may use any method or form that they may. It is unnecessary again to quote Sir Edward Grey's admissions upon this point; but, in passing, it may be said that, as Great Britain and the United States are the only parties to the treaty, so far as they agree upon an interpretation of it, that interpretation is undoubtedly binding upon them and upon every one else, according to acknowledged rules of interpretation, and the agreement renders unnecessary and improper any further consideration of the meaning of the words used in the treaty.

Other nations may grant subsidies equal to the tolls paid by their ships. Such is their right, and it is not an illusory one. It is equal to that of the United States and is equally capable of exercise. Its exercise imposes upon them and upon their treasuries no different burden than it does upon the United States. To say that, because she owns or operates the canal, a payment in the manner indicated is not real, is to forget that the tolls enter into the canal revenue, and to

ignore not only existing but also enduring facts. First, a word as to present conditions. Conservative estimates as to expense of maintenance and operation and interest charges are $30,000,000—a sum far in excess of any expected revenue. With the tolls on American ships as well as foreign ships applied to this expense account, any payment of subsidies by the United States must be made from other funds—funds that she is free to use as she wishes. To deny her the right to grant such subsidies as will increase the traffic and decrease the annual deficit is to impose upon her a disproportionate burden, to deny her equality of right. The day is never likely to dawn when the canal will be self-supporting, so greatly has its cost exceeded estimates. But suppose receipts ever did exceed expense and interest, what then? If we adopt the theory of Sir Edward Grey, rates should be reduced to make them reasonable and just; total charges ought not to exceed total expense; no one should pay more than a proportionate share of this. But suppose there should accrue to the United States a profit on operation, and suppose it is not our duty to waive it but that we may pass it to our treasury and use it for other purposes. It is then lawfully our money, honestly acquired. Will anyone outside of the United States claim a right to dictate or even to suggest how it shall be used?

The United States has a right to grant subsidies equal to tolls, then, because other nations have that right. Now it is most important to note that the right of the United States, though equal to that of other nations, in this matter, is not dependent upon their exercise of that right, for each is free to act according to its own interests as judged by itself. It is not a mere means of defense or of protection, but a right that may be used to secure an advantage.

Yet a consideration of the effect upon the United States if other nations could exercise any right of subsidizing which was denied to her, and the difficulty, if not the impossibility, of her preventing the exercise by them of any rights to subsidize that they may assert, fortifies the claim of the United States to such rights.

Has the United States any legal right to interfere with the right of other nations to grant subsidies equal to the tolls? Has she any effective means of enforcing the right? Does the use of those means entail difficulties so great that it is not to be presumed that the treaty contemplates that the United States shall make use of them? Can vessels of other nations be denied the use of the canal, upon payment

of the regular tolls, merely because they have received subsidies equal to the amount of the tolls? The treaty makes the canal open to all on terms of entire equality, if they observe certain rules. Not one of these rules has the slightest relation to aid that they may receive to enable them to compete for the world's traffic. The treaty gives no authority to prescribe further conditions or make other requirements—least of all, if those conditions or requirements conflict with the legislation of nations upon domestic affairs. Any attempt at exclusion, any exaction of an increased toll, with the idea of equalizing conditions, even though it might be claimed that conditions had been rendered unequal by the parties upon whom the increase was to fall, would seem to lack sanction by the treaty—in fact, to contravene its clearest expressions.

But it is urged by some that, independently of the treaty, the United States can protect itself from the effects of a subsidy granted by another nation by imposing upon the subsidized ship a countervailing toll equal to the amount of the subsidy received by it, similarly to the countervailing duties imposed by the United States and by the nations who are parties to the Brussels Sugar Convention upon importations of sugar from countries that grant a bounty upon its export; that the imposition of countervailing duties is lawful even though equality of tariff treatment has been promised by stipulations in most-favored-nation clauses. Despite the Sugar Convention and the laws of the United States imposing countervailing duties upon bounty-fed sugar, the inconsistent attitude taken by many of these very nations, in the matter, makes it questionable whether such a method of proceeding is consistent with international law. Several nations have openly and formally asserted that it is not justified by fixed principles or general practice. Germany, Austria-Hungary, and Denmark, all protested in 1894 against the American tariff Act that imposed such a countervailing duty, as being a violation of their treaty rights as most-favored-nations. Yet the two former had signed the Sugar Convention of 1888 containing a provision for the imposition of countervailing duties under just these circumstances. Mr. Gresham, the Secretary of State, sustained the protest and his report was submitted to Congress by President Cleveland with a recommendation for the repeal of the statute in order that we might not even seem to violate our treaty obligations. It is true that Mr. Olney, then Attorney General, at about the same time, gave an opinion upon a somewhat similar state

of facts and expressed a different view, and later this was adopted by Secretary of State Sherman. Russia has been as inconsistent in this matter as the United States. She protested vigorously against Great Britain's enforcement of a similar law, but she afterwards signed the Sugar Convention.

But if it be conceded that the modern practice of nations establishes their right, notwithstanding promises of equal tariff treatment, to impose increased duties to counteract bounties, what is the basis of the right, what the underlying principle? It is that the bounty itself creates an inequality of conditions. There are seemingly two views as to what *may* be done without violating treaty obligations or what *must* be done to fulfill them, and the difference of view seems to result from the difference between the traditional United States interpretation of the most-favored-nation clause and the European interpretation of it. The United States, apparently, claims the right to impose countervailing duties, but seemingly acknowledges no duty to do so—acknowledging no duty other than that of imposing them upon every nation if she imposes them upon one. She does not deny the right of other nations to establish such protective tariffs and to grant such bounties as they may see fit, but asserts the right to impose counteracting duties whenever her interests seem to require them. Suppose this principle were applied to canal subsidies, and the right but not the duty of the United States to impose increased tolls to counteract them and render them nugatory were admitted. What then? The exercise of the right would be nothing more than the declaration of the United States that she felt that her own interests would be advanced by such a course. Her denial of the duty would be an absolute admission of the right of other nations to subsidize. The right of the other nation being admitted, the right of the United States to subsidize could not be questioned. Moreover, even if the effectiveness of countervailing tolls as a protection to the United States against subsidy-aided competition is a complete answer to any argument that the right of subsidizing must be conceded to her because the exercise of such a right by other nations might injure her, it does not impair the validity and strength of the affirmative arguments that she possesses such a right. At the most it would only show that the right does not spring from the fact that others have it.

Let us now consider the other view referred to above, as to what *must* be done by a nation to fulfill its treaty obligations to give

equality of tariff treatment to others. It has been contended that "a country to which most-favored-nation treatment has been promised, may, if it gives no export bounty, justly complain that its rights under this clause have been destroyed by the admission into the territory of the other of imports from bounty-giving nations upon the same terms; that it is inconsistent with the spirit of such clauses to admit such bounty-fed articles, and that the clause demands that such unequal treatment be not permitted." Such were the arguments presented to the British Parliament when the sugar bounties were under consideration by it, as set forth in the officially published correspondence. I do not believe that the United States acknowledges any such duty, although a copy of this correspondence was attached to an instruction once sent by Secretary of State Sherman to the American Minister to Argentina, and seemed to be, in part, at least, expressive of his views. What would be the effect if such a principle were applied to canal subsidies? The United States would be under a duty, at the demand of any nation, to increase tolls upon the ships of any other nation to the point of rendering nugatory any subsidy of any kind granted by the latter that aided its ships in competing with others using the canal, whether the subsidy were direct or indirect, open or disguised. It was only when provision had been made for the offset of every kind and form of bounty upon sugar, that the several nations felt justified in signing the Sugar Convention. To have penalized the open bounty and to have overlooked the hidden bounty would have been as unjust as inefficacious. In order to discharge the duties that they assumed, these nations established regulations for manufacture under a bonded *régime,* for strict surveillance by customs officials, for the prevention of clandestine withdrawal and secret sales, and for the creation of a permanent commission that could inquire into and investigate and determine disputed questions of fact and solve complex legal problems. Such regulations were necessary to effectiveness; without effectiveness there could be no justice. Nearly all the interested nations were parties to that agreement and they had a great and a common interest in the accomplishment of its purpose, because the rivalry in the payment of bounties was depleting their treasuries and was not increasing their relative exports. Subsidies, like bounties, may be disguised. The most effective are often indirect. Their existence is often denied. The determination whether they exist and, if so, their amount, would entail a system of inquiry and investigation, of search-

ing and spying, of prying and probing, that would constantly create situations that would be delicate, difficult and dangerous. Is it to be believed that the treaty imposes upon the United States any such duty or gives her any such right? Is it reasonable to imagine that two nations should by an agreement between themselves thus attempt to interfere with the long-established, universally recognized rights of all the other nations to aid their commerce as they see fit, and to penalize them for the exercise of those rights? Would not such an interpretation of the treaty create such discord that the usefulness of the canal would be impaired and the very purpose of its construction be largely defeated?

[Thereupon, at 5 o'clock p.m., an adjournment was taken until 8 o'clock p.m.]